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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re THANH NGUYEN, On Habeas Corpus.	C062618 (Super. Ct. No. 39646)

In 1986 defendant Thanh Nguyen shot 14-year-old Bobby Carver three times, killing him. Defendant pled guilty to second degree murder and was sentenced to 15 years to life with a minimum eligible parole date of July 27, 1996. On June 2, 2008, the Board of Parole Hearings (Board) found defendant suitable for parole. However, the Governor reversed the Board's decision, concluding that if released, defendant would pose an unreasonable risk to public safety. Defendant filed a petition for writ of habeas corpus in the trial court, which the court denied. Defendant filed a petition for writ of habeas corpus in

this court, and we issued an order to show cause. We conclude the Governor's decision is not supported by the record and grant defendant's petition.

FACTUAL AND PROCEDURAL BACKGROUND

The Crime

Defendant was born in Vietnam in 1968, the son of a South Vietnamese soldier. Following the war, defendant worked with his father on their fishing boat. In 1977 defendant emigrated to the United States with his family in the fishing boat, first landing in the Philippines. Defendant's family eventually settled in Stockton. Defendant did not graduate from high school, but studied electronic engineering at a Stockton vocational school. While still in high school, defendant committed a misdemeanor burglary, his only prior offense.

At the time of the murder, defendant was known for working with Asians new to the community. There were tensions between the Asian community and the African-American community. Some Asian youths told defendant that the victim, Bobby Carver, and his older brother, Eric McKenzie, had been harassing them. They asked defendant to intervene on their behalf.

In 2006 defendant told the Board, "certain group of black and Hispanic were picking on those young kid, the Asian kid at the neighborhood, and the first incident when they beat up a little kid and when the neighborhood community called the police, and the police did show up [and] patrol the neighborhood for about a week or so and everything was quite [*sic*] down, and then later on this little girl went to school and was attacked

and was cut over the eyebrow with a knife." The police were contacted again and patrolled the area, but "when the police disappear, and here they come up again threatened people, so it happened one of juvenile in the car with me that night was it happened to be his sister and that day he come and ask me, you know, to go help him."

On October 31, 1986, defendant and three codefendants removed the rear license plate from their car and went in search of Eric McKenzie. They instead found Carver, who was walking with three other people. Someone said, "that's him," and Carver approached the car. Defendant shot Carver three times with a .32-caliber handgun before the car drove away. Fourteen-year-old Carver died from his wounds, and police arrested defendant a few days later.[1]

Parole Hearings

On eight occasions since 1995 Nguyen has appeared before the Board. Beginning in 2000 the Board advised defendant he was close to receiving a parole date. He was told by a deputy commissioner: "I think you're a young man that's got a good future ahead of you. You know, you made a terrible terrible mistake and you're still going to have to pay for it, you know, for however long and I really think that you can make it out

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[1] Carver's mother and his brother, Eric McKenzie, thought Carver might have been mistaken for McKenzie, since McKenzie had been in a few fights with Vietnamese boys in the neighborhood.

there too and with a little more work I think you can pull it together."

In 2006, after receiving his fifth one-year denial, defendant was told to study the Alcoholics Anonymous (AA) book, which would help him "when you get a date too because you are getting close." The presiding commissioner also told defendant, "we still felt with everything that you've done that you're moving in the right direction, this is why we are giving you a one-year denial, and within that year we feel . . . you are getting very close to getting a date if you continue to move in the direction that you're moving in at this time."

Board's Grant of Parole

On June 2, 2008, the Board found defendant did not pose an unreasonable risk of danger to society or a threat to public safety if released, and granted him parole. The Board based its decision on a variety of factors.

The Board noted defendant's lack of a juvenile record and that he had a stable social history. Defendant had an uneventful life prior to the commitment offense, with just one adult conviction of misdemeanor burglary, for breaking into a car. Defendant had a stable relationship with his family, both prior to and after his incarceration. Defendant's family visited him consistently in prison on a rotating basis, and the Board noted his "family ties have been close." Several family members offered defendant a home, job, transportation, and support following his release.

The Board also noted that defendant "enhanced [his] ability to function within the law through participation in education programs." The Board noted defendant earned a GED (general equivalency diploma) in 1991 and an associate of arts degree in business. He also participated in AA, the Victim Offender Reconciliation Group, "IMPACT," and Men's Violence Prevention Training.

The Board relied on defendant's "maturation, growth, greater understanding and advanced age" in granting parole. After serving 22 years in prison, defendant had made significant improvement in self-control. Defendant had only two nonviolent disciplinary actions, expressed remorse, and stated he "understand[s] the nature and magnitude of the offense and accept[s] responsibility for [his] criminal behavior and [has] shown a desire toward a change toward good citizenship."

Finally, the Board cited positive psychiatric evaluations by Dr. Starrett in 2007 and by Dr. Marek in 2006. Dr. Starrett noted defendant believed he acted like an "idiot" by taking the law into his own hands, was trying to act tough, and was not thinking correctly. Defendant said he was "very regretful" about Carver's death and stated, "No one has a right to take a life and how much it has hurt the victim's parents. I see what I put my own parents through. I regret what I've done, and I'm truly sorry."

Dr. Starrett concluded: "The inmate has apparently spent a considerable amount of time attempting to understand and gain insight into the causal factors of his crime. It is unlikely

that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate."

The Deputy Commissioner stated it was his third time on a panel considering defendant's parole and noted he was familiar with defendant's case, commenting, "you persevered and you didn't get involved in any negative programs in prison, so I'm really impressed with that. And sometimes patience and perseverance pays [*sic*] off and I think today your patience and your perseverance and your programming paid off for you. And I just want to be amongst the ones to congratulate you for receiving a date."

The Governor's Decision to Reverse

The Governor's parole release review acknowledged defendant had no juvenile record, pled guilty to the crime, took steps toward self-improvement by participating in programs, pursued educational opportunities, did well on job assignments, and received favorable evaluations from correctional and mental health professionals over the years. The Governor noted defendant maintained "seemingly solid relationships and close ties with supportive family members," with offers of work and a place to live.

In reversing the Board's grant of parole, the Governor noted the gravity of the crime, defendant's lack of insight, and defendant's need for further self-help programs. He stated defendant's most recent mental health evaluation rated his risk of future violence as "low moderate" when considering his

history. These four factors led the Governor to reverse the grant of parole.

The Governor found the facts of defendant's crime to be "particularly heinous" due to the premeditation of defendant and his codefendants in removing the license plate and setting off to find the "black guy" who harassed local Vietnamese. Defendant's actions showed an "exceptionally callous disregard for human life and suffering." He fled the scene without seeking medical aid for the wounded Carver.

Although defendant currently accepts personal responsibility for his crime and expresses remorse, the Governor found defendant's version of events had changed significantly over the years, indicating a lack of insight into the circumstances surrounding the crime. At the time of his arrest and for approximately 10 years thereafter, defendant claimed he did not murder Carver. In 1990 defendant told a mental health evaluator his codefendants conspired to make him a "scapegoat." A decade after the murder, defendant admitted killing Carver and "taking the law into [his] own hands." The Governor found these conflicting statements indicative of defendant's lack of insight into the circumstances of the offense and that he "has not done enough to ensure that these circumstances will not reoccur."

The Governor also expressed concern over defendant's limited participation in self-help and therapy programs in prison. Although defendant participated in AA and Narcotics Anonymous (NA), there was no evidence defendant suffered from substance abuse. Defendant had not participated in self-help or

therapy since 2002. According to the Governor, "Considering the exceptional violence Mr. Nguyen demonstrated when he perpetrated the murder, I believe he would benefit from additional, and consistent, participation in self-help and therapy programs, particularly in the areas of anger and impulse management."

As previously noted, the Governor cited defendant's most recent mental health evaluation, which rated his risk of future violence as "low moderate" when considering historical factors. As expressed by the Governor, "Although the gravity of the crime supports my decision, this mental-health evaluation, in conjunction with Mr. Nguyen's lack of documented self-help and therapy, and his lack of insight into the circumstances of his life offense, indicates to me that Mr. Nguyen poses a current unreasonable risk to public safety if released at this time."

Superior Court's Denial of Habeas Corpus

The superior court considered the four factors identified by the Governor in reversing defendant's parole. The court noted parole is the rule and not the exception. However, the court also acknowledged that "[a]s long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision."

As to the first factor, the nature of the offense, the court reiterated the Governor's description of the murder, finding the motive was revenge for the cutting of defendant's

friend's sister. The crime, the court stated, also showed elements of premeditation and callousness. According to the court, "the motive was trivial relative to the significance of the murder."

Regarding the second factor, defendant's failure to acknowledge responsibility for the murder for 10 years after his conviction, the court noted that in 2007 defendant stated he committed the crime because he was a "hard-headed tough guy" and "immature." Defendant expressed regret for the effect the murder had on the victim's parents and his own parents. The court also stated earlier psychological reports were "fairly silent" regarding defendant's level of insight.

The court also considered the third factor, the rating of defendant's risk for future violence as "low moderate" by a mental health evaluator. The court observed the same report evaluated defendant's potential for violence on the HCR-20 (Historical-Clinical-Risk Management-20) as "low" on the "clinical/insight" factor, "low" on the "risk management" factor, and "low" overall. Defendant was also rated "low" for general recidivism on the LS/CMI (Level of Service/Case Management Inventory) scale. Defendant's "Overall Risk Assessment" rated him "low" in psychopathy, "low" in comparison to other inmates, and "low" for recidivism.

Regarding the fourth factor, the court found: "More importantly, Governor Schwarzenegger concluded that [defendant] has not sufficiently participated in self-help and therapy. There is evidence that [defendant] participated in AA and/or NA

through 2006, but he last participated in other self-help or therapy programs . . . in 2002." The court noted the Governor believed defendant would benefit from additional, consistent participation in self-help and therapy programs, particularly in the areas of anger and impulse management. The court found the record disclosed that the Board recommended defendant study the 12-step program as one way to "continue self-help programming."

Ultimately, the court denied defendant's petition. The court stated the Governor may decide what weight is to be given to the evidence and found defendant's lack of participation in self-help or therapy since 2006 sufficient to justify denying parole.

Defendant filed the instant petition. We issued an order to show cause.

DISCUSSION

I.

Parole allows an incarcerated individual to reintegrate into society as a constructive individual as soon as possible without serving his entire sentence. By converting prisoners into constructive citizens, parole also lowers the costs of imprisonment. (*In re Vasquez* (2009) 170 Cal.App.4th 370, 379-380.)

Penal Code section 3041 sets forth the procedure under which the Board makes parole decisions for indeterminate life inmates. One year before the prisoner's minimum eligible parole release date, a Board panel that meets with the inmate "shall normally set a parole release date," and shall do so "in a

manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public." (Pen. Code, § 3041, subd. (a).) This release date must comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of the date. (*Ibid.*)

A parole release date shall be set unless the Board determines "the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." (Pen. Code, § 3041, subd. (b).)

Under Board regulations, the panel must determine whether the inmate is suitable for parole. Regardless of the length of time served, a life prisoner will be denied parole if the panel determines the inmate will pose an unreasonable risk of danger to society if released from prison. (Cal. Code Regs., tit. 15, § 2402, subd. (a).)[2] A parole date set under the regulations "shall be set in a manner that provides uniform terms for offenses of similar gravity and magnitude with respect to the threat to the public." (§ 2041.)

The Board considers six factors tending to show an unsuitability for parole: (1) commission of the offense in an

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[2] All further undesignated section references are to title 15 of the California Code of Regulations.

especially heinous, atrocious, or cruel manner; (2) a previous history of violence; (3) an unstable social history; (4) prior sadistic sexual offenses; (5) a lengthy history of severe mental problems related to the offense; and (6) serious misconduct in prison or jail. (§ 2402, subd. (c)(1)-(6).)

Alternatively, the Board considers nine factors evincing a suitability for parole: (1) the absence of a juvenile record; (2) a history of reasonably stable social relationships; (3) tangible signs of remorse; (4) the commission of the crime resulted from significant stress, especially if the stress had built over a long period of time; (5) battered woman syndrome; (6) lack of a history of violent crime; (7) increased age, which reduces the probability of recidivism; (8) development of marketable skills or a reasonable plan for the future; and (9) responsible institutional behavior. (§ 2402, subd. (d)(1)-(9).)

The Board exercises its discretion in determining the importance of these factors. (§ 2402, subds. (c), (d).) In reviewing the Board's parole decision, the court considers only whether some evidence in the record supports the decision based upon the factors specified by statute. "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board], but the decision must reflect an individualized

consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board's] decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 (*Rosenkrantz*).)

The Board's parole decision is subject to review by the Governor. "The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action." (Cal. Const., art. V, § 8, subd. (b); see Pen. Code, § 3041.2.) The Governor must give individual consideration to the prospective parolee and consider all relevant statutory factors related to the inmate's postconviction behavior and rehabilitation. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1219 (*Lawrence*).)

The Governor's determination of an inmate's suitability for parole is subject to the same standard as that of the Board. It is also subject to review under the deferential "some evidence" standard. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1084.)

In determining whether "some evidence" supports the Governor's determination, we focus on whether there is "some evidence" of the core statutory determination that the inmate remains a current threat to public safety, not merely whether "some evidence" supports the Governor's characterization of the facts in the record. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254 (*Shaputis*).) Where one or more factors are relied upon to support a denial of parole, we must determine whether those factors, when considered in light of the other factors in the record, are predictive of the current danger posed by the inmate. (*Id.* at pp. 1254-1255.)

II.

In denying defendant parole, the Governor determined the defendant's murder of Carver was "particularly heinous." The Governor noted defendant premeditated the murder, and his action in leaving Carver to die following the shooting showed an "exceptionally callous disregard for human life and suffering."

One of the factors suggesting unsuitability for parole is that the murder was committed "in an especially heinous, atrocious or cruel manner." (§ 2402, subd. (c)(1).) The elements to be considered in assessing the gravity of the commitment offense include: "(A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner

which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense." (§ 2402, subd. (c)(1)(A)-(E).)

Part of the Governor's justification for denying parole is defendant's premeditation of the crime; his searching out Carver, shooting him three or four times; and his fleeing without seeking medical help for his victim. However, all second degree murders, by definition, involve some callousness, some lack of emotion or sympathy, emotional insensitivity, and indifference to the feelings and suffering of others. The atrociousness of the act does not involve general notions of common decency or social norms, for by that definition all murders are atrocious. Instead, the question is whether among murders the one committed by defendant was particularly heinous, atrocious, or cruel. (*In re Burdan* (2008) 169 Cal.App.4th 18, 36 (*Burdan*); *In re Lee* (2006) 143 Cal.App.4th 1400, 1410.)

The fact that defendant shot Carver three times, in retaliation for the cutting of a little girl with a knife (in what was apparently a case of mistaken identity), does not demonstrate the crime was particularly egregious, atrocious, or heinous. Defendant did not attack, injure, or kill multiple victims; he did not carry out the murder in a dispassionate and calculated manner, such as an execution-style murder, or in a manner that demonstrates an exceptionally callous disregard for human suffering; nor was the motive for the murder inexplicable or trivial. (§ 2402, subd. (c)(1).)

We faced a very similar issue in *Burdan*, in which the defendant shot and killed his wife while the two sat in her car discussing their marital problems. The Board found the defendant suitable for parole; the Governor reversed the decision, concluding the defendant's release would pose an unreasonable risk to public safety because of the grave nature of the conviction offense. (*Burdan*, *supra*, 169 Cal.App.4th at p. 23.) We found the defendant's due process rights were violated by the Governor's decision to deny parole based solely on the circumstances of the charged offense and granted the defendant's petition for writ of habeas corpus.

We found the fact that the defendant shot his wife multiple times at close range following a struggle in her car over the gun did not demonstrate the crime was particularly egregious, atrocious, or heinous. (*Burdan*, *supra*, 169 Cal.App.4th at p. 36.) In addition, even if we assumed the crime was marginally more heinous than the typical second degree murder, this alone would not support the Governor's decision. We noted that the Board or Governor may base a denial of parole decision on the circumstances of the offense, but only if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. (*Id.* at pp. 36-37.) We concluded: "'Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before

the Board or the Governor.'" (*Id.* at p. 37, quoting *Lawrence*, *supra*, 44 Cal.4th at p. 1221.)

To determine whether the defendant in *Burdan* continued to pose a danger to society due to the nature of the offense, we considered two Supreme Court decisions: *Lawrence* and *Shaputis.* In *Lawrence*, the defendant murdered her lover's wife by shooting and stabbing her repeatedly. After remaining a fugitive for 11 years, she voluntarily turned herself in. (*Lawrence*, *supra*, 44 Cal.4th at p. 1193.) The Board found the defendant suitable for parole based on multiple positive factors, including an exemplary record of rehabilitation, her acceptance of responsibility for the crime, and her close family ties. The Governor reversed the Board based on the gravity of the commitment offense. (*Id.* at p. 1190.)

The Supreme Court concluded the Governor's decision was not supported by "some evidence" that the defendant remained a threat to public safety. (*Lawrence*, *supra*, 44 Cal.4th at p. 1191.) The Court noted that during her nearly 24 years of incarceration, the defendant participated in many years of rehabilitative programming specifically tailored to address the circumstances that led to the crime, including anger management programs. (*Id.* at p. 1226.) The court also noted the passage of time since the crime, the defendant's age and lack of criminal history before and after the crime, her lack of serious rules violations, the stress she was under at the time of the crime, and the unlikelihood that the same circumstances would reoccur. (*Id.* at pp. 1225-1226.) According to the Court:

"[W]e conclude that the unchanging factor of the gravity of petitioner's commitment offense has no predictive value regarding her *current* threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole at the present time." (*Lawrence*, *supra*, 44 Cal.4th at p. 1226.)

Conversely, in *Shaputis*, the Supreme Court upheld the Governor's reversal of parole grant. Evidence in the record supported a conclusion that the circumstances of the offense continued to be predictive of current danger to society despite the defendant's discipline-free record in prison. The defendant failed to take responsibility for the murder of his wife despite years of rehabilitative programming and participation in substance abuse programs. The defendant failed to gain insight into his previous violent behavior, and abuse of his wife and children prior to the murder. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1246, 1249.)

After reviewing the two Supreme Court decisions, we determined the Governor's denial of parole in *Burdan* amounted to merely a recitation of the circumstance of the offense absent any articulation of a rational nexus between those facts and the defendant's current dangerousness. All postconviction evidence supported the determination that the defendant had been rehabilitated and no longer posed a danger to public safety, and the Governor had failed to provide a modicum of evidence of unsuitability for parole. (*Burdan*, *supra*, 169 Cal.App.4th at p. 39.)

Here, the Governor reversed defendant's parole based in part on the circumstances of the crime, describing it as "particularly heinous" with defendant having an "exceptionally callous disregard for human life and suffering." However, the circumstances of the present case are far more akin to the facts of *Lawrence* and *Burdan* than to the facts of *Shaputis*. As in *Burdan*, defendant did not attack multiple victims, did not employ violence beyond what was necessary to accomplish the crime, did not mutilate the victim, and did not act with an "exceptionally callous disregard for human suffering." (*Burdan*, *supra*, 169 Cal.App.4th at p. 36.)

Nor was the motive for defendant's crime inexplicable or trivial. In *In re Rico* (2009) 171 Cal.App.4th 659, the defendant drove the car in which a codefendant shot and killed an opposing gang member in retaliation for the rival gang's shooting at the defendant's car. (*Id.* at p. 665.) The Board found the defendant's actions exhibited an exceptionally callous disregard for human suffering. The appellate court found a single fatal gunshot wound was not exceptionally callous, since the defendant and his fellow gang members did not taunt or terrorize the victim. (*Id.* at p. 682.) The court also determined the motive for the crime was not trivial or inexplicable. An inexplicable motive involves an offense unconnected to the victim's conduct, reflecting an unpredictable and dangerous perpetrator. (*Ibid.*) The court reasoned that, although there is no lawful motive for murder, a retaliation shooting is wrong, but not trivial or inexplicable. (*Ibid.*)

Here, defendant was motivated by a recent attack on a neighborhood child, the culmination of tensions between various local ethnic groups. Again, nothing justifies murder, but defendant's actions did not reflect an impulsive and fickle perpetrator whose volatility and capriciousness made predictions of future violence impossible.

The record does not support the Governor's evaluation of defendant's crime as particularly heinous and predictive of defendant's continuing danger to society. As the Supreme Court in *Lawrence* stated: "[M]ere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Lawrence*, *supra*, 44 Cal.4th at p. 1227.)

III.

The Governor also found that although defendant accepts responsibility for Carver's murder and expresses remorse, his version of events has changed significantly over the years, showing he lacks full insight into the circumstances of his crime. The Governor cited defendant's statements following his arrest and continuing for approximately 10 years that one of his accomplices was responsible for the murder and he was made the scapegoat.

However, the Governor does not dispute that defendant has admitted his responsibility for the murder for the 13 years since his first parole hearing and has accepted full responsibility for the death of Carver. In 1995 a psychological

evaluation stated defendant "accepts full responsibility for what he did and that he feels badly for what happened." In 1997 a psychological evaluation found that, according to test results, defendant was experiencing "self evaluation through maturation as well as introspection." Defendant regretted committing the crime and had done much "soul searching and is still in the process of that as he grows and matures."

In 2004 defendant told staff psychologists, "It's a cycle; you hurt a lot of people in the community when you use violence." Defendant also said he could not imagine the sorrow and devastation his actions caused Carver's family, sentiments he repeated in 2006.

A 2007 evaluation reveals defendant believed he acted like an idiot by taking the law into his own hands. Defendant was trying to act tough, and was immature and not thinking correctly. Defendant stated, "No one has a right to take a life and how much it has hurt the victim's parents. I see what I put my own parents through. I regret what I've done, and I'm truly sorry." The evaluating psychologist noted: "It is unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate."

The Governor contends the 2007 evaluation does not address defendant's feelings toward Carver, but instead focuses on defendant's newfound respect for the law and acknowledgment of the emotional devastation his actions inflicted on both his family and Carver's family. According to the Governor: "The

evaluation does not address the significance of Nguyen's statement that he 'made the mistake of taking the law into my own hands.' Nguyen claims that he accepts responsibility for his commitment offense and is remorseful for his actions, but the Governor found that he fails to understand the nature and magnitude of his offense."

It is difficult to understand how one can accept responsibility for one's actions and express remorse for the impact on the victim's family yet not understand the nature and magnitude of the offense. Defendant stated he made a mistake and acted like an idiot in taking the law into his own hands. Again, it is unclear what further articulation is necessary to express defendant's understanding of exactly why his murder of Carver was wrong.

During his 2008 parole hearing, defendant stated he would walk away if faced with the same situation again. He told the panel he knew from all his years in prison that he had caused Carver's family tremendous pain and suffering, and there was no way "on earth that I will . . . cause another family to go through this pain again. I will let the law take care of it." In addition, the Board noted defendant showed signs of remorse, accepted responsibility for his previous criminal behavior, and evinced a desire to "change toward good citizenship."

The Governor relied on a psychological report from 1990 to establish defendant's lack of insight. In contrast, the psychological reports from 1995 to the present have consistently found defendant understood the gravity of his offense and felt

remorse for his actions. The Supreme Court has rejected reliance on old reports when more recent reports show progress by the defendant. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1224-1228.)

Given the record before us, replete with defendant's admissions of culpability and regret for his actions over the 13 years since his first parole consideration hearing, the Governor's reliance on defendant's lack of insight into the murder of Carver is not supported by the record. Nor does this perceived, but unsubstantiated, lack of insight provide evidence that defendant currently poses an unreasonable risk of danger if released.

IV.

Finally, the Governor determined defendant would "benefit from additional, and consistent, participation in self-help and therapy programs, particularly in the areas of anger and impulse management" given the exceptional violence of the crime. The Governor noted defendant participated in AA and NA even though there was no evidence he had a substance abuse problem. In addition, defendant had not participated in any programs since 2002.

The record belies the Governor's claim. As the Board noted, defendant has completed numerous self-help programs, including victim awareness, IMPACT and the victim/offender program, two religious courses with Prison Ministries Fellowship, and an anger management course. (Exh. B, 41) Defendant participated in AA and NA programs for many years, a

fact the Governor discounts since there was no evidence defendant had a substance abuse problem. However, the Governor does not explain why these self-help programs would not benefit someone without substance abuse issues. In fact, at the 2006 hearing the Board advised defendant to study the AA book, since "that will also help you when you get a date . . . because you are getting close."

In defendant's most recent evaluation in 2007, Dr. Starrett concluded: "The inmate can identify a number of causal factors involved in the controlling case. Alcohol and drugs were not involved in the case. The crime was influenced by an existing racial conflict in the area. The motive for the crime was revenge. The victim and his older brother had cut one of the inmate's friends prior to the controlling case. The two brothers were known for beating up Asians and for carrying weapons. The police were allegedly looking for the victim's older brother for involvement in a prior murder case and in the case discussed above. The inmate admitted he took the law into his own hands. He was not thinking, and he was immature. He thought he was a tough guy, and he failed to use his head. The inmate expressed an appropriate level of remorse for his actions. The inmate has apparently spent a considerable amount of time attempting to understand and gain insight into the causal factors of his crime. *It is unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate. . . . In this particular evaluation, the*

inmate's insight, or understanding of the causal factors of the crime, was appropriate. In addition, his general cognitive insight was within normal limits." (Italics added.)

In addition to Starrett's findings, the record is replete with evidence that defendant understands the gravity of the crime he committed, suffers remorse for his actions, and is determined not to repeat his past criminal behavior. At his 2008 parole hearing, defendant told the Board he understood the tremendous pain he had caused Carver's family and would never cause another family to go through that pain again.

In 2006 Dr. Marek stated defendant continued to acknowledge the sorrow and devastation he caused Carver's family. Marek found defendant's "judgment and insight appear to have improved. If released to the community his violence potential is estimated to be average when compared to citizens in the community. There are no significant risk factors for a return to violence." At his 2006 parole hearing, defendant stated he would apologize to Carver's mother, admit his culpability, and seek forgiveness.

In 2004 staff psychologist C. Brown interviewed defendant, who stated that if he had it to do over again he would "just walk away." He told Brown he was a disgrace to his beliefs, and if given the chance, he would give back to the community by lecturing in churches and schools about his experience, and be an example of why violence must be avoided. Defendant expressed remorse about the impact on his family, Carver's family, and his community. He also told Brown he was trying to be a better person.

In a 1997 report, Charles Galbo noted that, according to test results, defendant was experiencing "self evaluation through maturation as well as introspection." Defendant regretted committing the crime and had done much soul searching. A 1999 prisoner evaluation report stated defendant admitted full responsibility for Carver's death.

In the 1995 report for defendant's initial parole consideration hearing, defendant's counselor stated defendant took full responsibility for the crime. Defendant's 1995 psychological evaluation stated defendant "accepts full responsibility for what he did and that he feels badly for what happened."

The record reveals defendant's history of continuing to acknowledge responsibility; voicing remorse at the pain caused his victim's family, his community, and his own family; and desire to never repeat his criminal action. In addition, defendant's lack of disciplinary problems while incarcerated and his continuing to pursue educational opportunities underscore the benefits from his participation in self-help programs. Based on the record, there is no modicum of evidence to support the Governor's claim that defendant does not have insight into the circumstance of his crime and needs further self-help therapy. Nor has the Governor offered any evidence in the record that defendant currently needs further courses in anger management, which would render him a current danger to the public. (*Lawrence*, *supra*, 44 Cal.4th at p. 1212, 1221-1228.)

Other courts have reached this same conclusion in similar factual situations. The Supreme Court in *Lawrence* found, "The passage of time is highly probative to the determination before us, and reliance upon outdated psychological reports—clearly contradicted by petitioner's successful participation in years of intensive therapy, a long series of reports declaring petitioner to be free of psychological problems and no longer a threat to public safety, and petitioner's own insight into her participation in the crime—does not supply some evidence justifying the petitioner continues to pose a threat to public safety." (*Lawrence*, *supra*, 170 Cal.App.4th at pp. 1223-1224.)

In *In re Gaul* (2009) 170 Cal.App.4th 20, the appellate court rejected the Board's denial of parole based on the defendant's need for further therapy. The *Gaul* court concluded: "In light of these more recent, positive psychological assessments of [the defendant], previously accepted as valid by the Board, the findings that even more therapy is needed or that therapeutic gains need to be maintained for additional time—and the Board's concomitant conclusion that Gaul is not now suitable for parole—lack any evidentiary support." (*Id.* at p. 39.)

v.

The Governor also noted defendant's most recent risk evaluation described his risk of future violence as "low moderate" when considering historical factors. However, Dr. Starrett stated in his 2007 report that the historical category is based on immutable facts, including "age at the time

of the crime, his involvement in unstable relationships, and not establishing a career."

The Governor fails to explain why the historical category rating of "low moderate" reveals defendant as a current risk to society. Dr. Starrett, after considering the historical factors, rated defendant's "overall risk assessment" as low for psychopathy, low for overall propensity for violence, and low for general recidivism.

An immutable fact, such as a category rating, is only supported by "some evidence" if it supports the ultimate conclusion that the defendant currently presents an unreasonable risk to public safety if paroled. (*Lawrence*, *supra*, 44 Cal.App.4th at p. 1221.) Defendant's historical category rating does not support this conclusion.

VI.

The Governor argues that if we find a due process violation in his denial of defendant's parole, we should remand to the Governor to proceed in accordance with due process. However, as the Governor concedes, the proper remedy is to vacate the Governor's decision and reinstate the decision of the Board. (*Burdan*, *supra*, 169 Cal.App.4th at p. 39.)

In *Lawrence*, *supra*, 44 Cal.4th 1181, the Supreme Court reviewed a decision of the Court of Appeal that had reversed the decision of the Governor denying parole. In the words of *Lawrence*, "the Court of Appeal issued a writ vacating the Governor's reversal of the Board's decision, and reinstated the Board's 2005 grant of parole to petitioner." (*Id.* at p. 1201.)

The Supreme Court ultimately ruled, "the judgment of the Court of Appeal is affirmed." (*Id.* at p. 1229.) That judgment included the remedy fashioned by the Court of Appeal. Thus, following *Lawrence*, this court held in *Burdan*: "[T]he proper remedy is to vacate the Governor's decision and to reinstate that of the Board. [Citation.]" *Burdan*, *supra*, 169 Cal.App.4th at p. 39.)

We recognize that *Burdan*'s conclusion on this point may be in doubt in light of the recent case, *In re Prather* (2010) 50 Cal.4th 238, where the Supreme Court held that the proper remedy, in a case in which *the Board's decision* is not supported by some evidence, is to remand to the Board for a new hearing based on "the *full* record—including evidence previously considered by the Board, as well as additional evidence not presented at prior parole hearings." (*Id.* at p. 258.) Nonetheless, the Board is not the Governor, and until directed otherwise by our Supreme Court, we will follow *Lawrence* and *Burdan*. We express no opinion on the appropriate disposition where, following the Governor's decision, the Board conducts another hearing and denies parole.

VII.

To summarize, the Governor's stated reasons for reversal of the Board's grant of parole are not supported by some evidence. The Governor did not articulate a rational nexus between any of his reasons and defendant's current dangerousness.

We remain mindful of our deferential standard of review. However, *Lawrence* makes clear that our judicial review must be

thorough enough to reveal and remedy any evident deprivation of constitutional rights. Accordingly, the relevant inquiry is whether some evidence supports the decision of the Governor that defendant constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1211-1212.) After evaluating the evidence, we conclude that the Governor's decision violated defendant's due process rights and that his petition should be granted.

DISPOSITION

The petition for a writ of habeas corpus is granted. The Governor's decision reversing the Board's grant of parole is vacated and the Board's decision is reinstated. The order to show cause, having served its purpose, is discharged.

RAYE, P. J.

We concur:

NICHOLSON, J.

SIMS, J.*

* Retired Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.